OCTOBER TERM, 1996

No. 96-

JOHN C. KOSTER, III, EDWARD E. DUPEN,
KENNETH A. STEVENS, AND CYNTHIA LOOMIS MILLER,
Appellants,

v.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MARYLAND

BRIEF FOR NATIONAL COALITION FOR PUBLIC
EDUCATION AND RELIGIOUS LIBERTY
AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 730

JOHN C. ROEMER, III, EDWARD E. DOERR, KENNETH A. STEVENS, AND CYNTHIA KOONCE MILLER,
Appellants,

–v.–

BOARD OF PUBLIC WORKS OF THE STATE OF MARYLAND; MARVIN MANDEL, GOVERNOR; LOUIS L. GOLDSTEIN, COMPTROLLER; JOHN A. LUETKEMEYER, TREASURER; COLLEGE OF NOTRE DAME OF MARYLAND, INC.; MOUNT SAINT MARY'S COLLEGE; SAINT JOSEPH COLLEGE AT EMMITSBURG, MARYLAND, INC.; AND THE ASSOCIATED PROFESSORS OF LOYOLA COLLEGE IN THE CITY OF BALTIMORE, INC., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF FOR NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The National Coalition for Public Education and Religious Liberty* is, as its name indicates, an unincorporated association of organizations concerned with the preservation of the nation's public educational system and the First Amendment's dual principle of religious liberty and the separation of church and state.

"Designed," as Mr. Justice Frankfurter noted,[1] "to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people," our public school system rests on three fundamental principles of universality—universality of control, of access and therefore of support. The public school system is controlled by all of the public, even by those whose children do not attend it.[2] It is open to all; it may not exclude children whose parents are too poor to pay taxes any more than those whose parents are wealthy enough to pay tuition at private schools. It may not exclude children

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* *Participating Organizations:* American Civil Liberties Union; ACLU of Connecticut; American Ethical Union; American Humanist Association; American Jewish Congress; Americans United for Separation of Church and State; Baptist Joint Committee on Public Affairs; Central Conference of American Rabbis; Illinois PEARL; Minnesota Civil Liberties Union; Missouri Baptist Christian Life Commission; Missouri PEARL; New York PEARL; Monroe County, New York PEARL; Nassau-Suffolk PEARL; Michigan Council Against Parochiaid; National Association of Laity; National Council of Jewish Women; National Education Association; National Women's Conference, American Ethical Union; Preserve Our Public Schools; Public Funds for Public Schools of New Jersey; New York State United Teachers; Ohio Free Schools Association; Union of American Hebrew Congregations; Unitarian Universalist Association.

[1] *McCollum v. Board of Education*, 333 U.S. 203, 216 (1948) (concurring opinion).

[2] *Kramer v. Union Free School District*, 395 U.S. 621 (1969).

because of their race,[3] religion,[4] political beliefs,[5] or because their standards of behavior or intellectual achievement may be below those the school authorities would like to maintain. And because it may not close its doors to any of the public, it is constitutionally entitled to financial support out of taxes imposed upon all of the public, even those who have no children or elect to send their children to nonpublic schools. The constituent organizations of the *amicus* and their members believe that division of tax-raised funds between public and nonpublic schools presents a threat to the integrity of public education.

They are no less concerned with the integrity of the mandate of religious freedom and the separation of church and state in the First Amendment to our Constitution. They believe that by protecting religion against the intrusion of civil authority and by making it impossible for the state to become a battleground for sectarian preference and favor, the First Amendment has preserved both our political freedom and our religious freedom. As this Court noted in *Lemon v Kurtzman*, 403 U.S. 602, 622 (1971), "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."

Because of this dual concern, the constituent organizations have participated as parties or as *amici curiae* in many of the cases which have involved the issue of governmental financing of religious schools on the elementary and secondary school level, and some of them also on

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[3] *Brown v. Board of Education*, 347 U.S. 483 (1954).

[4] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *McCollum v. Board of Education*, 333 U.S. 203 (1948).

[5] *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

the higher education level. While the case now before the Court involves only the latter, the *Amicus* agrees with the majority of the Court in *Lemon v. Kurtzman* and *Tilton v. Richardson*, 403 U.S.672 (1971), that there is no basic difference in the First Amendment principles applicable to aid to religious education schools at any level.[6]

Accordingly, *Amicus* has sought and obtained the consent of the parties to this case to the submission of this brief.

THE NATURE OF THE ACTION

This is a suit by taxpayers challenging the constitutionality under the First and Fourteenth Amendments to the United States Constitution of a Maryland statute appropriating public funds for outright grants to eligible colleges and universities. (The text of the statute, Annotated Code of Maryland, Article 77A, Secs. 65–69, as amended, is set forth in the appendix to the Jurisdictional Statement at A. 52–56.) All State-accredited, nonprofit private colleges and universities, other than those "awarding *only* seminarian or theological degrees," are eligible to receive the funds. (Sec. 66. Emphasis added.) The statute, as amended, provides that "[n]one of the moneys payble under this subtitle shall be utilized by the institutions for sectarian purposes." (Sec. 68A.) There is nothing in the statute, however, that excludes sectarian institutions, no matter how sectarian they may be, so long as they do not limit themselves to awarding only seminarian degrees.

[6] Simultaneously with the Court's decision in *Lemon v. Kurtzman* (hereinafter *Lemon*), *Tilton v. Richardson*, and *Earley v. DiCenso*, 403 U.S. 602 (1971), the Court remanded *Kervick v. Clayton*, 403 U.S. 945 (1971) and *Hunt v. McNair*, 403 U.S. 945 (1971); both involving aid to church related colleges, for reconsideration in light of the Court's decisions in *Lemon*, *Tilton* and *DiCenso*.

The District Court, over the dissent of Senior Circuit Judge Bryan, held that while the statute was unconstitutional as originally enacted, the fatal defect was eliminated by the 1972 amendment forbidding use of appropriated funds for sectarian purposes.[7] Accordingly, the statute was declared constitutional on its face and as applied, and the application for an injunction against its enforcement was denied. (Jurisdictional Statement, A. 25.)

THE QUESTION TO WHICH THIS BRIEF IS ADDRESSED

This brief is addressed to the single question whether public funds can be allocated as outright grants to sectarian or denominational colleges with no safeguards other than (a) exclusion of institutions which confer only seminarian or theological degrees, and (b) prohibition of utilization of the allocated funds "for sectarian purposes."

SUMMARY OF ARGUMENT

In *Tilton v. Richardson*, *supra*, and *Hunt v. McNair*, 413 U.S. 734 (1973) (hereinafter *Hunt*), the Court refused to hold unconstitutional on their face statutes appropriating public funds to finance in part the erection of facilities on church-related college premises to be used exclusively for secular purposes. In the present case, the majority of the court below did what this Court carefully avoided doing in those cases, namely, extend its ruling to encompass all-purpose grants to all church-related colleges and universities, no matter how sectarian they may be in ownership, control, operation and purpose. The court

[7] On authority of *Lemon v. Kurtzman*, 411 U.S. 192 (1973); the majority held that the sectarian institutions which had received funds prior to the amendment should not be required to refund to the State the moneys so received. Jurisdictional Statement, A. 25.

below recognized that there was some distinction between construction grants and all-purpose "non-categorical" grants, but held that the "distinction does not rise to constitutional dimensions." Jurisdictional Statement, A. 17.

The court below was in error. Dangers to First Amendment interests are implicated to a substantially less extent in construction grants than in all-purpose funding. The factors which impelled this Court to invalidate on their face all post-*Tilton* grant statutes other than for construction of facilities require a similar determination in the present case. This is particularly so in view of the fact that all these cases involved categorical or specific grants, and some of them were grants not made directly to the sectarian institutions but to the pupils or their parents. Certainly no less strict a standard can be applied when, as in the present case, the grant is non-categorical and is made directly to the sectarian institutions.

ARGUMENT

POINT I. A law providing direct all-purpose grants of tax-raised funds to sectarian educational institutions at the college no less than at lower levels violates the Establishment Clause of the First Amendment and is unconstitutional on its face.

A. *The Post-Tilton Decisions*

Before *Tilton*, the Court upheld two statutes granting funds benefitting sectarian schools; in both, the grants were to pupils or their parents rather than to the schools, and in both they were for a single specified purpose. In *Everson v. Board of Education*, 330 U.S. 1 (1947), it sustained a grant to finance bus transportation to parochial schools, and in *Board of Education v. Allen*, 392 U.S. 236 (1968), it sustained a grant to finance the

purchase of secular textbooks loaned to pupils attending nonpublic schools. With *Allen*, the Court called a halt. It made its intention clear in *Lemon*, and reiterated it in *Sloan v. Lemon*, 413 U.S. 825 (1973); where it said (at 832):

> . . . Such benefits [as allowed in *Everson* and *Allen*] were carefully restricted to the purely secular side of church-affiliated institutions and provided no special aid for those who had chosen to support religious schools. Yet such aid approached the "verge" of the constitutionally impermissible. . . . In *Lemon* we declined to allow *Everson* to be used as the "platform for yet further steps" in granting assistance to "institutions whose legitimate needs are growing and whose interests have substantial political support". . . . *Again today we decline to approach or overstep the "precipice" of establishment against which the Religion Clauses protect.* Citations omitted. Emphasis added.)

Beginning with *Lemon*, the Court showed by its decisions that it meant what it said in that case. Other than the two construction grant cases, *Tilton* and *Hunt*, it struck down every effort to apply tax-raised funds for the use of sectarian or denominational educational institutions.

In *Lemon*, it invalidated a purchase-of-services statute financed out of the proceeds of horseracing.

In *Sanders v. Johnson*, 403 U.S. 955 (1971), it affirmed without opinion a District Court decision (319 F. Supp. 421) holding unconstitutional a purchase-of-services statute financed out of the general treasury.

In *Earley v. DiCenso, supra*, it held unconstitutional a salary supplement law.

In *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); it ruled invalid a statute providing tuition payments for low-income families.

In *Sloan v. Lemon, supra*, it invalidated a tuition reimbursement law.

In *Essex v. Wolman*, 409 U.S. 808 (1973), it affirmed without opinion a District Court decision (342 F. Supp. 399) ruling unconstitutional a general tuition grants law.

In *Nyquist*, it struck down a law providing tax benefits for parents whose children attend parochial schools.

In *Grit v. Wolman*, 413 U.S. 901 (1973), it affirmed without opinion a District Court decision (353 F. Supp. 744) invalidating a law providing tax credits for such parents.

In *Nyquist*, it held unconstitutional statutory maintenance and repair grants to parochial schools.

In *Levitt v. Committee for Public Education and Religious Liberty*, 413 U.S. 472 (1973), it nullified statutory grants to pay for law-mandated services performed in parochial schools.

In *Donahey v. Protestants and Other Americans United for Separation of Church and State*, 403 U.S. 955 (1971); it denied a petition for certiorari to review a Court of Appeals decision, *Protestants and Other Americans United for Separation of Church and State v. United States*, 435 F. 2d 627 (1971), holding that, notwithstanding *Allen*, a substantial Federal question requiring the convening of a three-judge court was presented in an attack upon the textbook title of the Elementary and Secondary Education Act of 1965.

In *Brusca v. State Board of Education*, 405 U.S. 1050 (1972), it affirmed a decision (332 F. Supp. 275) holding that exclusion of parochial schools from tax-funding of education did not violate any constitutional rights of parents sending their children to such schools.

In *Franchise Board v. United Americans*, —— U.S. ——, 95 S. Ct. 166 (1974), it affirmed a District Court decision invalidating a statute providing tax reductions for parents of parochial school pupils.

In *Luetkemeyer v. Kaufmann*, —— U.S. ——, 95 S. Ct. 167 (1974), it affirmed a decision upholding a Missouri law limiting free transportation to pupils attending public schools.

Finally, in *Marburger v. Public Funds for Public Schools*, — U.S. ——, 94 S. Ct. 3163 (1974), it affirmed a District Court decision (358 F. Supp. 29) holding unconstitutional a New Jersey statute providing auxiliary services, textbooks, instructional materials and instructional equipment to private and parochial schools.

Two aspects of these decisions are of particular significance to the determination of the present case. First, with the exception of *Earley v. DiCenso* and *Levitt v. Committee for Public Education and Religious Liberty*, all the cases were decided without a trial record; in each case, the Court held that the challenged statute was unconstitutional on its face. Second, in every case involving, as the present case does, a direct grant of funds to sectarian schools, the challenged statute limited use of the funds for a specified, secular purpose, obviously recognizing that an all-purpose grant could not pass constitutional muster. In the light of the second factor, it is difficult to see how the majority of the court below could reach the conclusion that

the difference between construction and all-purpose grants "does not rise to constitutional dimensions."

B. *Tilton* and *Hunt*

The reliance of the majority of the court below was solely on *Tilton* and *Hunt*. It could hardly be otherwise; in view of the quotation above from *Sloan v. Lemon*, the majority could not rely on the single-purpose, carefully circumscribed grants upheld in *Everson* and *Allen*, and all the other challenged statutes had been declared unconstitutional by this Court. It is therefore necessary to examine into what *Tilton* and *Hunt* actually held.

Tilton involved a suit challenging the inclusion of sectarian colleges in the Higher Education Facilities Act of 1963. That law provided Federal construction grants for college facilities, public and private, except facilities to be used for sectarian instruction or religious worship, or which were part of a school or department of divinity. (It should be noted that in this respect the Federal act is more stringent than Maryland's. Under the former, a grant could not be made to finance facilities used even for secular purposes so long as they were part of a school or department of divinity. Under the latter, they could be used for secular purposes so long as the school confers at least one degree in addition to a theological degree.)

The law also provided that, if the exclusion of use for sectarian instruction or religious worship were violated within twenty years of the grant, the government could recover the amount of the grant, but after that period the institution could use the facility for any purposes it wished, including religious purposes.

The Court unanimously held unconstitutional on its face that part of the act which allowed use of the governmentally financed facilities for religious purposes after twenty years. It could not be assumed, it held, that the facilities had no further substantial value after that period, and therefore allowing them to be used for religious purposes would violate the First Amendment's prohibition of governmental aid to religion. A majority of the Court, though unable to agree on a single opinion, held that the balance of the law was not unconstitutional on its face, and the plurality, after examining into the nature and operations of the four church-related institutions joined as defendants in the suit, determined that it was not unconstitutional as applied to them.

The plurality made it quite clear that it did not intend to immunize from judicial challenge construction grants to all church-related or denominational colleges; indeed, it noted that the governmental authorities that administered the act had themselves declared ineligible some such colleges (403 U.S. at 682). It held only that on the facts as produced at the trial the four defendant colleges were correctly held by the authorities and the lower court to be eligible.

In *Hunt*, the Court upheld the constitutionality of the South Carolina Educational Facilities Authority Act as applied to a specific Baptist college. The act empowered the State Authority to assist colleges, through the issuance of revenue bonds, in constructing facilities which were not to be used for sectarian instruction or religious worship. Neither the State nor the Authority was obligated, directly or indirectly, to pay the principal or interest on the bonds; the State's taxing power was neither pledged nor implicated; all expenses of the Authority were to be paid solely out of the revenues of the projects.

It is obvious that the relationship between the State and the college in *Hunt* was far less than in the governmental grants challenged in *Tilton*. On its face, it seems little more than an ordinary banking transaction, costing the State nothing and aiding the colleges only in that a lower rate of interest would have to be paid by them by reason of the fact that the income on the bonds would not be subject to income taxation. (413 U.S. at 738–39.) The Court could, therefore, have disposed of the case on the ground that the relationship did not implicate governmental aid to religion within the purview of the cases we have heretofore cited in this brief; indeed, this was exactly the ground upon which the New Jersey Supreme Court upheld the similar statute challenged in *Kervick v. Clayton*. (56 N.J. 523, at 530–31.)

This Court did not elect to do so. Instead, it examined into the fact situation as it had done in *Tilton* and reached the same conclusion in respect to the Baptist college as it had in respect to the Catholic colleges in *Tilton*. In their brief herein, appellants examine exhaustively into the nature and operations of the defendant colleges and, we suggest, demonstrate persuasively that none of them can pass constitutional muster under the guidelines set forth and applied in *Tilton* and *Hunt*. There is nothing we need add to appellants' analysis of the facts and therefore limit ourselves to consideration of the question why the Court did not declare the statutes challenged in *Tilton* and *Hunt* unconstitutional on their face as it had done in respect to all the other statutes in the cases we have cited.[8]

[8] Even in the two cases in which trial records were presented to this Court, *Earley v. DiCenso* and *Levitt v. Committee for Public Education and Religious Liberty*, it is clear that the Court held the challenged statutes unconstitutional on their face. A single opinion was written in *DiCenso* and *Lemon* although there was no trial record in the latter case, and in *Levitt* the Court's opinion made no reference to the trial record other than a brief statement to the effect that, just as the statute on its face did not require recipient schools to account for funds received from the State, so the stipulated facts show that they are not required to do so. 413 U.S. at 477–78.

C. *College Grants and Construction Grants*

In two ways the grants involved in *Tilton* and *Hunt* differ from those in all the other cases cited in this brief: (1) the former were to colleges and all the others to elementary and secondary schools, and (2) the former were for or in connection with construction of facilities whereas the others encompassed a wide variety of purposes. We submit that the educational level of the recipient institutions is constitutionally critical in respect to construction grants but not in cases of other types of grants and particularly not in cases of all-purpose grants.

That a construction grant to sectarian or denominational schools on the elementary or secondary school level is unconstitutional on its face is clear from the following quotation from *Nyquist*, a case decided without a trial record:

> . . . If tax-raised funds may not be granted to institutions of higher learning where the possibility exists that those funds will be used to construct a facility utilized for sectarian activities 20 years hence, *a fortiori* they may not be distributed to elementary and secondary sectarian schools for the maintenance and repair of facilities without any limitation on their use. If the State may not erect buildings in which religious activities are to take place, it may not maintain such buildings or renovate them when they fall into disrepair. 413 U.S. at 776–77 (citations omitted).

It is true that, as noted in *Hunt*, "Mr. Chief Justice Burger's opinion for the plurality in *Tilton* placed considerable emphasis on the fact that the federal aid there approved would be spent in a college setting" (413 U.S. at 746), but in the light of the above quotation from *Nyquist*, the reason for this is quite obvious: had the construction grant been made to a religious school at the elementary or secondary level, it would have been adjudicated unconstitutional on its face.

There are many reasons supporting our suggestion that the fact that the recipients in *Tilton* and *Hunt* were colleges was not the constitutionally critical factor. We have already noted that on their appearances before this Court in 1971 *Hunt* and *Kervick v. Clayton* were remanded for reconsideration in the light of not only *Tilton* but also *Lemon* and *DiCenso*. We have noted, too, that in *Tilton* itself a majority of the Court deemed the Establishment Clause and its application to educational institutions equally determinative on the college and elementary and secondary school levels. We call the Court's attention to the emphasis in the plurality opinion in *Tilton* to the fact that what was involved there was "a one-time, single-purpose construction grant." Unlike the present case, there was, as the opinion emphasized, "no continuing financial relationships or dependencies, no annual audits, no government analysis of an institution's expenditures on secular as distinguished from religious activities. Inspection as to use is a minimal contact." (403 U.S. at 688.)

In *Hunt* the Court quoted from *Nyquists* to "reaffirm . . . the principles which govern" consideration of challenges to statutes as violative of the Establishment Clause, including what was before the Court in *Hunt*, aid to colleges. 413 U.S. at 741. Nothing in the Court's

opinion states or implies that colleges are exempt from the strictures of these principles.

The present case challenges all-purpose grants. Such grants, of course, can be used for salary payments. Yet, in *Tilton* the plurality opinion distinguished *Lemon* and *DiCenso* in that there "the state programs subsidized teachers, either directly or indirectly." 403 U.S. at 687.

The cases we have cited in this brief reveal some of "the ingenious plans for channeling state aid to sectarian schools"[9] which until now have proved to be vain efforts to get around the barrier of the Establishment Clause. We do not believe that this Court intended at any time to hold that not one nor several but all of the ingenious plans would be effective if the recipient institution were a college rather than an elementary or secondary school.

We conclude this Point of our brief by submitting that a statute authorizing all-purpose grants of government funds to sectarian or denominational educational institutions is unconstitutional on its face, whether the institution be at the college, secondary or elementary level.

Point II. The facial unconstitutionality of an all-purpose grant of government funds to a sectarian or denominational educational institution is not cured by a provision forbidding utilization of the funds for sectarian purposes.

We have argued the facial unconstitutionality of the Maryland statute as originally enacted because we cannot assume that the appellees would concede the point. We do, however, note that the court below has held just that. After finding that the defendant colleges qualified under

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[9] *Nyquist*, 413 U.S. at 785.

the *Tilton-Hunt* criteria, it nevertheless held that as enacted the challenged statute was unconstitutional on its face even as to them. The court said:

> The original version of this Act, passed in 1971, provided no restrictions on sectarian use of funds. Accordingly, the 1971 version was unconstitutional. As substantial funds were paid out in 1971 to the five schools, this Court must decide whether to order the recipient schools to refund the illegally paid funds to the State of Maryland. (Jurisdictional Statement, A–23.)

The majority of the court, however, reached the conclusion that the otherwise fatal defect was cured by the 1972 amendment which added Sec. 68A providing:

> None of the moneys payable under this subtitle shall be utilized by the institutions for sectarian purposes. (Jurisdictional Statement, A–54).

We respectfully submit that the majority was in error for the following reasons:

1. Except in the limited instances of construction of facilities, this Court has not previously held that a prohibition against sectarian use immunizes from constitutional challenge a grant of funds to a religious educational institution. Recognizing that an all-purpose grant would clearly be unconstitutional, State legislative and other authorities have sought to insulate the government subsidy from sectarian use.

The efforts of the Pennsylvania legislature to achieve this are described as follows in *Lemon:*

> There are several significant statutory restrictions on state aid. Reimbursement is limited to courses "present in the curricula of the public schools." It is further limited "solely" to courses in the following "secular" subjects: mathematics, modern foreign languages, physical science, and physical education. Textbooks and instruction materials included in the program must be approved by the state Superintendent of Public Instruction. Finally the statute prohibits reimbursement for any course that contains "any subject matter expressing religious teaching, or the morals or forms of worship of any sect." (403 U.S. at 610. Footnote omitted.)[10]

The Rhode Island legislature went even further. Teachers receiving salary supplements out of tax-raised funds could teach only subjects that were offered in State public schools, could use only teaching materials used in the public schools, and had to sign an agreement "not to teach a course in religion for so long as or during such time as he or she receives any salary supplements." 403 U.S. at 608.

The Connecticut statute invalidated in *Sanders v. Johnson, supra,* (Connecticut Public Act No. 791, Section 7) provided that "[n]o portion of the salary of any teacher in a nonpublic school who during the regular school day teaches any subject matter expressing religious teaching or instructs in religious or denominational tenets, doctrine or worship shall be reimbursable under this act."

In *Nyquist, Sloan v. Lemon, Essex v. Wolman* and *Grit v. Wolman,* all involving statutes seeking either through tuition rebates or tax benefits to reimburse parents of pupils attending religious schools for the tuition paid by them, the respective legislatures carefully limited the

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[10] In the omitted footnote the Court notes that Latin, Hebrew and classical Greek are excluded from the category of foreign languages, presumably because they could be used for religious purposes.

amount of reimbursement to sums not exceeding the portion of the tuition attributable to secular instruction.

None of these efforts proved successful. In each case the Court declared the challenged statute unconstitutional on its face. In none of them, moreover, were the grants made directly to the schools: in *Lemon*, *DiCenso* and *Sanders* they were made to the teachers, in the other cases to the parents of the pupils. Finally, in all of them the challenged law provided for single-purpose grants; none of them involved all-purpose grants, obviously more vulnerable to constitutional challenge than the former.

2. Insulation of the secular from the sectarian in an all-purpose grant is practicably impossible. In the best of faith and with the most scrupulous efforts to avoid use of any part of all-purpose grants for the support of sectarian instruction or religious worship, it is simply not feasible to achieve this.

The first part of the statute challenged in *Nyquist* provided funds for the maintenance and repair of non-public schools. There was no dissent to the Court's invalidation of this section of the statute. In this part of its opinion, which was concurred in by all the members of the Court, it said:

> . . . The grants, totaling $30 or $40 per pupil depending on the age of the institution, are given largely without restriction on usage. So long as expenditures do not exceed 50% of comparable expenses in the public school system, it is possible for a sectarian elementary or secondary school to finance its entire "maintenance and repair" budget from state tax-raised funds. No attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, *nor do*

> *we think it possible within the context of these religion-oriented institutions to impose such restrictions.* Nothing in the statute, for instance, bars a qualifying school from paying out of state funds the salary of employees who maintain the school chapel, or the cost of renovating classrooms in which religion is taught, or the cost of heating and lighting those same facilities. . . 413 U.S. at 774 (emphasis added).

An all-purpose grant obviously permits use of the funds to subsidize maintenance and repair, but as a practical matter how can the qualifying school avoid using part of it to pay the salaries of employees who maintain the entire school premises and facilities including the school chapel and the classrooms in which theology is taught, or to pay for the cost of renovating classrooms in which religion is taught, or to pay the cost of heating and lighting these facilities, or to pay for the removal of snow from the entrances of the entire premises? If the school installs an all-building air conditioner, how can it be shut off from classrooms while they are being used to teach religion? What can be done about elevators stopping at floors with classrooms used for religious teaching and others used only for secular instruction?

All-purpose use, of course, includes use to pay for the tuition of students. In *Nyquist*, *Sloan v. Lemon*, and *Essex v. Wolman*, the Court held that this cannot constitutionally be done if the educational institution to which the tuition is paid is religious. The reason for this ruling was that there is no way by which the tuition can be divided between the costs of religious and non-religious instruction.

Under the Maryland statute, the grants can be used to pay for telephone costs. But how can the telephone

communications be monitored and policed to exclude those relating to the school's divinity program or theological instruction?

What about equipment such as typewriters or computers or audio-visual aids such as projectors? And what about supplies such as examination booklets, typewriter ribbons, chalk, board erasers, etc.? How can the sectarian and nonsectarian use of these be separated?

Illustrations such as these can be multiplied almost indefinitely, but the ones we have chosen are enough to show that the 1972 amendment to the Maryland statute calls upon the recipients of tax-raised funds to do something which simply cannot be done if the funds are used to subsidize the operations of sectarian or denominational colleges, including theological seminaries which award a single non-divinity degree.

3. Even if the separation mandated by the 1972 amendment were feasible, it could be achieved only at the cost of governmental surveillance of the operations of the recipient schools and involvement in their administration which could only be characterized as excessive. In *Tilton*, the plurality held that surveillance and entanglement relating to a governmental grant for the construction of a specific facility in a non-divinity college was of manageable dimensions and less than constitutionally forbidden excessiveness. But this is a far cry from reaching the same determination in the case of all-purpose grants encompassing all the operations and all the facilities of sectarian or denominational colleges. Although *DiCenso* involved schools on the elementary and secondary level, what the Court said in that case is, we suggest, applicable no less in the present case:

> . . . The Rhode Island Legislature has not, and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion—indeed the State here has undertaken to do so. To ensure that no trespass occurs, the State has therefore carefully conditioned its aid with pervasive restrictions.
>
> A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church.

In *Levitt v. Committee for Public Education and Religious Liberty*, *Nyquist*, and *Sloan v. Lemon*, the Court refused to accept cost accounting procedures to assure that the percentage of an institution's budget applicable to secular operations represented a sum at least equal to the amount of government funds received by it, and that therefore the grants did not advance religion. But even if the Court had ruled otherwise and had held that on-the-premises monitoring and policing could be dispensed with and a "statistical guarantee of neutrality" [11] be substituted therefor, the necessary government audit-

[11] *Nyquist*, 413 U.S. at 787.

ing of the books and operations of the recipient institutions would itself bring with it the excessive entanglement and administrative involvement which the Establishment Clause forbids. *Walz v. Tax Commission*, 397 U.S. 664, 674–75 (1970); *Lemon*, 403 U.S. at 621–22; *DiCenso*, 403 U.S. at 620. Again we quote from *DeCenso:*

> There is another area of entanglement in the Rhode Island program that gives concern. The statute excludes teachers employed by nonpublic schools whose average per-pupil expenditures on secular education equal or exceed the comparable figures for public schools. In the event that the total expenditures of an otherwise eligible school exceed this norm, the program requires the government to examine the school's records in order to determine how much of the total expenditures is attributable to secular education and how much to religious activity. This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches. The Court noted "the hazards of government supporting churches" and we cannot ignore here the danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with the Religion Clauses. *Ibid.* (Citation omitted.)

In *Tilton*, the plurality expressed the view (obviously shared by four other members of the Court) that for a grant to colleges to be upheld under the Establishment Clause there must be "no continuing financial relationships or dependencies, no annual audits, no government

analysis of an institution's expenditures on secular as distinguished from religious activities" (403 U.S. at 688). Obviously, the grant challenged herein does not meet that test.

Conclusion

Whatever may be the case in respect to a single-purpose grant to a sectarian or denominational college, a statute providing all-purpose grants to such schools violates the Establishment Clause and its invalidity is not negated by the presence of a clause or sentence forbidding use of the granted funds for sectarian purposes. Accordingly, the judgment of the District Court should be reversed and the Maryland statute declared unconstitutional on its face.

Respectfully submitted,

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